Bonnell/Tredegar Industries, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 10–CA–25994 and 10–CA–26648

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On January 8, 1993, Administrative Law Judge Howard I. Grossman issued the attached decision in Case 10–CA–25994. The Respondent filed exceptions and a supporting brief, the Charging Party filed a cross-exception and a supporting brief, the General Counsel, the Respondent, and the Charging Party filed answering briefs, and the Respondent filed a reply brief. Thereafter, on June 22, 1993, the parties in Case 10–CA–26648 filed a joint stipulation and motion to transfer and to consolidate these cases. On September 16, 1993, the Board issued an order accepting the stipulation, consolidating the cases, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Charging Party filed briefs and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision, the joint stipulation, and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, in Case 10–CA–25994, and to find merit to the allegations of the complaint in Case 10–CA–26648.

For the reasons set forth below, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay employees Christmas bonuses in 1991 and 1992 in accord with its longstanding formula for determining the amount of these bonuses, without securing the Union's consent to a new formula for calculating the bonuses.

Facts

The Union has represented the Respondent's production and maintenance employees for at least 18 years. The parties' most recent bargaining agreement was effective by its terms from January 20, 1990, to January 19, 1993. For many years prior to December 1991, the Respondent paid employees a Christmas bonus and calculated the bonus on the basis of a formula of 1 hour's pay for each week of the year that an employee has worked at least 32 hours, up to a total of 40 hours. Under this formula, each employee typically received a Christmas bonus each year of approximately $300 to $400. The Respondent's obligation to pay employees a Christmas bonus is set forth in the parties' 1990–1993 collective-bargaining agreement, in conjunction with the Respondent's other fringe benefit plans, as follows:

> ARTICLE XVI
> INDUSTRIAL RELATIONS PLANS
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> All employees in the plant are entitled to such service credit as accrued under the COMPANY's continuity of service rules and the COMPANY will recognize such service for participation in the following COMPANY Industrial Relations Plans:
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> 1. Group Insurance Plan (Exhibit B)
> 2. Vacation Plan (Article XII)
> 3. Military Leave Plan (Article XI and Article XV)
> 4. Leave of Absence Plan (Article XV)
> 5. Pension Plan (Exhibit C)
> 6. Continuity of Service Rules (Exhibit C)
> 7. Jury Duty Plan (Article XI)
> 8. Funeral Leave Plan (Article XI)
> 9. *Christmas Bonus*
> 10. Thanksgiving Turkey
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> *All of these plans shall remain in full force and effect during the term of this Agreement.* However, the COMPANY may, on notice to the UNION, make any changes in such plans as necessary to keep such plans in compliance with the regulations of the Treasury Department or other governmental agencies so that COMPANY contributions to such plans shall be proper tax deductions and shall not be considered wages for any purpose. The COMPANY may make such changes as may be required or desirable in the contracts between the COMPANY and Insurance Underwriters to make the plans conform to any subsequent statutory enactments or judicial or administrative interpretation of any law relating to such plans, or changes to conform to actuarial experience from time to time, or changes of wording for clarity of any plan
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> . . . .
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> With respect to life insurance, dependent life insurance, accidental death and dismemberment insurance and weekly disability coverage under the Group Insurance Plan, the COMPANY will continue to pay the full cost of these plans for employee coverage and reserves the right to change employee contributions to the extent required by reason of adjusted premium rates assessed by the carrier . . . . [Emphasis added.]

In December 1990, the initial Christmas holiday period arising under the 1990–1993 bargaining agreement, the Respondent paid employees a Christmas bonus and calculated the bonus according to the established formula of 1 hour's pay for each 32-hour week worked, up to a total of 40 hours.[1] On November 13,

[1] Consistent with its December 1990 Christmas bonus payment, the Respondent in March 1990 distributed to employees a booklet sum-

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1991, however, the Respondent notified employees by letter that ''[t]he decision has . . . been made to reduce the . . . Christmas bonus this year to $100 per employee.'' By letter dated November 15, 1991, the Union advised the Respondent that it ''strongly object[ed]'' to the reduction of the Christmas bonus. Thereafter, consistent with its November 13, 1991 announcement, the Respondent paid each eligible employee a Christmas bonus of $100 for Christmas 1991. The Union filed a grievance over the reduced Christmas bonus payment and, on January 28, 1992, the Respondent denied the grievance and refused to arbitrate the dispute.[2] It is undisputed that the Respondent's decision to limit Christmas bonuses to $100 in 1991 was undertaken unilaterally and without consultation with the Union.

The parties have stipulated that the Respondent and the Union negotiated to impasse over the amount of the Christmas bonus for 1992 and that the Respondent thereafter implemented its last offer. The parties have also stipulated that the 1991 Christmas bonus was approximately 29 percent and the 1992 Christmas bonus was approximately 30 percent of the Christmas bonus paid in 1990.

The parties' 1990–1993 bargaining agreement also contains the following provisions:

ARTICLE XXIV
ENTIRE AGREEMENT

> This Agreement constitutes the sole and entire existing agreement between the Parties and supersedes all prior agreements, committments [sic], and practices, whether oral or written, between the COMPANY and the UNION or the COMPANY and any of the covered employees, and expresses all obligations of, and restrictions imposed on, the COMPANY.

ARTICLE IV
MANAGEMENT OF PLANT

> Except as abridged by a specific provision of this Agreement, the management of the plant and the direction of the working force including the right to plan, direct and control plant operations; to contract for work and services; to schedule and assign work to employees; to determine the means, methods, processes, materials and schedules of production; to determine the products to be manufactured, the location of its plant and the continuance of its departments; to establish production standards and to maintain the efficiency of employees; to establish and require employees to observe COMPANY rules and regulations; to hire, terminate or relieve employees from duties; to maintain order and to suspend, demote, discipline and discharge employees for just cause, are rights solely vested in the COMPANY.
>
> The foregoing enumeration of Management's rights shall not be deemed to exclude other rights of Management not specifically inconsistent with this Agreement.

Discussion

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act as elucidated in Section 8(d) of the Act, by modifying a term of a collective-bargaining agreement without the consent of the other party while the contract is in effect.[3] It is undisputed that the Respondent did not, in either 1991 or 1992, obtain the Union's consent to payment of Christmas bonuses in amounts less than those that would result from application of the long-followed workweek-based formula. The issue is whether the formula is a term of the agreement.

The Respondent's obligation to pay employees a Christmas bonus benefit is clearly mandated by the terms of the parties' 1990–1993 bargaining agreement. More particularly, article XVI provides that employees ''are entitled'' to accrued service credit for a variety of ''Industrial Relations Plans,'' including ''Christmas Bonus.'' Article XVI also provides with respect to ''All of these plans'' that they ''shall remain in full force and effect during the term of this Agreement.''

When the 1990–1993 bargaining agreement was negotiated, the Respondent had for many years maintained the Christmas bonus plan by payments to each employee of 1 hour's pay for each 32-hour week worked during the year, up to a maximum of 40 hours. That formula was the Christmas bonus plan as it existed on the negotiation of the 1990–1993 bargaining agreement and, indeed, as it existed through the initial

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marizing employee benefits. Item VI of the booklet provides as follows:

VI. CHRISTMAS BONUSES

> Employee will receive one (1) hour's pay for each week in which he worked thirty-two (32) hours up to a maximum of forty (40) hours.

[2] Art. VIII, sec. l of the 1990–1993 bargaining agreement provides, with respect to the arbitration and grievances, that:

> It is further understood and agreed that the provisions of this article shall not apply to matters affecting the change in wages and rates of pay as set forth in Exhibit ''A'' attached hereto, nor shall the provisions of this article apply to the administration and contents of the COMPANY benefits plans listed in article XVI hereof, except that specific cases affecting administration of the benefits received under the following plans (Vacation, Leave of Absence, Jury Duty, Funeral Leave and Military Leave) shall be subject to the grievance and arbitration provisions of this Agreement. It is understood and agreed that this provision will not alter or change any part of this Agreement.

[3] *Manley Truck Line*, 271 NLRB 679, 681 (1984), enfd. 779 F.2d 1327 (7th Cir. 1985), and cases there cited.

year of that agreement when the Respondent paid employees their Christmas bonus in 1990 using the above-described formula. Further, when the Respondent distributed a booklet to employees in March 1990 it advised them what it understood to be the Christmas bonus plan: employees are to receive a Christmas bonus of 1 hour's pay for each week worked, up to a maximum of 40 hours.

Article XVI is clear as to what the Respondent is contractually obligated to do. It is contractually obligated to maintain the Christmas bonus plan ''in full force and effect during the term of this Agreement.'' The Respondent contends, however, that it was not obligated to pay a yearly Christmas bonus during the term of the 1990–1993 bargaining agreement based on a formula of 1 hour's pay for each week worked but, instead, was contractually privileged to pay a Christmas bonus of whatever amount it desired. Under the Respondent's construction, both the term ''plans'' and the phrase ''remain in full force and effect during the term of this Agreement'' would be rendered meaningless, because they would add nothing to the requirement that a Christmas bonus be given.

We find that the plain meaning of the parties' contractual agreement that the plan ''shall remain in full force and effect during the term of this Agreement'' is that the plan, and all its integral parts, one of which is the formula for calculating the Christmas bonus, shall remain unchanged during the term of the agreement. Although the formula is not specifically set forth in article XVI, it is an implicit term of the agreement by virtue of the reference to required maintenance of a ''plan'' respecting the bonus. An implicit contract term is just as significant for Section 8(d) purposes as an express term. See *Communications Workers (C & P Telephone)*, 280 NLRB 78, 82 (1986); *Chemical Workers Local 29 (Morton-Norwich Products)*, 228 NLRB 110l (1977). Cf. *E. I. du Pont & Co.*, 294 NLRB 563 (1989), remanded sub nom. *Martinsville Nylon Employees v. NLRB*, 969 F.2d 1263 (D.C. Cir. 1992). We need only to look to the particulars of the Christmas bonus formula that existed on the effective date of the agreement to determine the established ''plan'' that the contract required ''shall remain in full force and effect.'' And there is no dispute on this record as to what that formula was at that time: 1 hour's pay for each 32-hour week worked, up to a maximum of 40 hours.

The Respondent points to several provisions of the 1990–1993 bargaining agreement to support its contention that *contractually* it retained discretion to set the amount of the bonus. We find these contentions unpersuasive.

First, the Respondent contends that the methods for calculating other ''non-wage benefits'' are explicitly set forth in the 1990–1993 agreement while the method for calculating the Christmas bonus is not explicitly set forth in the agreement. The agreement's lack of specificity as to how the Christmas bonus is to be paid, however, by no means establishes that the contract reserves to the Respondent the right to set the amount of the bonus at its discretion. It seems likely that if the parties had intended to confer on the Respondent sole discretion to set the amount of the Christmas bonus at whatever amount the Respondent deemed appropriate (theoretically a bonus payment of $1 or even 1 cent), they would have said so. Instead, the parties agreed that the Christmas bonus plan, then averaging a payment of $300 to $400 per employee, ''shall remain in full force and effect during the term of this Agreement.'' Moreover, article XVI on its face provides for certain circumstances in which the Respondent contractually ''may make . . . changes'' as necessary or required. These pertain to circumstances confined to maintaining compliance with statutory, judicial, or administrative regulations or as called for by insurance requirements. This shows that when the parties intended to confer discretion on the Respondent to make changes in the benefit plans, they did so explicitly.

Second, the Respondent contends that the contractual arbitration provision expressly excludes bonus disputes from arbitration but includes disputes over other benefits. That the parties decided to exclude certain subjects from their grievance-arbitration machinery does not establish that the Respondent thereby contractually retained the discretion to set the amount of the Christmas bonus. The exclusion of certain benefit provisions from the grievance-arbitration procedure is open to any number of possible inferences, including the likelihood that the parties simply preferred to resolve disputes over these subjects in other forums. Moreover, the contractual arbitration provision states on its face that it does not alter or change any other part of the contract, e.g., the Respondent's obligation to retain the Christmas bonus in full force and effect.

Third, the Respondent contends that the 1990–1993 agreement has an ''entire agreement/zipper clause'' expressly excluding past practices not expressly incorporated into the bargaining agreement. Article XXIV provides that the agreement is the ''sole and entire existing agreement,'' ''supersedes all prior agreements, committments [sic], and practices, whether oral or written,'' and ''expresses all obligations of, and restrictions imposed on, the [Respondent].'' Article XXIV has no effect, however, on obligations, restrictions, agreements, commitments, and practices that are part of the bargaining agreement, namely, the parties' contractual agreement that the Christmas bonus plan ''shall remain in full force and effect during the term of this Agreement.''

Fourth, the Respondent relies on the contractual management-rights provision (art. IV), under which the Respondent retains all rights not specifically inconsistent with the bargaining agreement. The Respondent's reliance on this provision is misplaced because the provision on its face states that it is inapplicable to matters covered ''by a specific provision of this Agreement,'' here the commitment set forth in article XVI that the Christmas bonus plan shall remain in full force and effect for the contract's duration.

Finally, the Respondent contends that the parties' bargaining history shows that it retained discretion to administer the Christmas bonus plan as it saw fit. It notes that the parties entered into ''letter agreements'' or side agreements on other subjects but failed to enter into a letter agreement limiting the Respondent's discretion to calculate the amount of the Christmas bonus. Again, article XVI itself limits the Respondent's discretion to alter the Christmas plan because it provides expressly that the plan shall remain in full force and effect during the term of the agreement.[4]

In sum, we find that both the ''pre-impasse'' unilateral change at Christmas 1991 and the postimpasse implementation at Christmas 1992 violated Section 8(a)(5) and (1), as explained in Section 8(d). This is so because, in both instances, the Respondent effectively changed the terms of the parties' agreement that the Christmas bonus plan ''shall remain in full force and effect during the term of this agreement.''[5] Inasmuch as the continuation of the Christmas bonus plan in unchanged form for the duration of the agreement was a term of the 1990–1993 bargaining agreement, it follows that the Christmas bonus plan was not subject to change during the contract term other than by the mutual agreement or with the consent of the Union. Because there was no such agreement, and because the Respondent failed to secure the Union's consent, the Respondent violated Section 8(a)(5) and (1) of the Act.[6]

[4] With respect to the parties' bargaining history, we observe that the Respondent's spokesman at negotiations, B. F. Wilburn, testified that the parties ''did not actually discuss the Christmas Bonus'' and that the subject only arose in conversation on one occasion, when Wilburn commented to the Union that there were times when he did not like things such as Christmas bonuses, because ''rarely did the Company get the recognition during contract negotiations for that type thing.'' Further, the record shows that the contractual zipper clause and management-rights provision in the 1990–1993 agreement remained unchanged from previous agreements.

[5] We find no merit to the Respondent's contention that the implemented Christmas bonus payment of $100 is not a material, substantial, and significant change from the payments of $300 to $400 calculated under the established formula of 1 hour's pay for each week in which an employee worked 32 to 40 hours.

[6] We note that the Respondent's unilateral alteration of the Christmas bonus plan for Christmas 1991 without bargaining with the Union would violate Sec. 8(a)(5) and (1) even if the agreement did not contain the wording ''shall remain in full force and effect during the term of this Agreement.'' Thus, as the judge found, it is well settled that a bonus that has been paid consistently over a number of years is a component of employee wages and, therefore, is a term and condition of employment that cannot be unilaterally altered or abolished by an employer without affording the bargaining representative an opportunity to bargain, regardless of whether payment of the bonus is expressly provided for in a bargaining agreement. *TCI of New York*, 301 NLRB 822, 824 (1991). Although the Board noted in *TCI of New York* that a union's right to bargain over a term and condition of employment can, of course, be waived, the party asserting the existence of a waiver must show that the right to bargain has been clearly and unmistakably relinquished. Here, there is no explicit provision in the agreement that confers on the Respondent the right to change unilaterally the customary formula establishing the amount of a contractual entitlement, without first having to fulfill statutory bargaining obligations. As the Supreme Court stated in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708(1983):

> [W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated.

Accordingly, even if the Union's consent to a new formula was not required under Sec. 8(d), the Respondent would still be required to bargain to impasse before altering an established condition of employment. This it failed to do in 1991.

ORDER

The National Labor Relations Board orders that the Respondent, Bonnell/Tredegar Industries, Inc., Newnan, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to abide by the terms of the 1990–1993 collective-bargaining agreement with the Union by failing to pay employees Christmas bonuses in 1991 and 1992 in accord with its longstanding formula of 1 hour's pay for each week the employee has worked at least 32 hours, up to a maximum of 40 hours.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Abide by the terms of the 1990–1993 collective-bargaining agreement with the Union by restoring the formula for paying employees a Christmas bonus based on 1 hour's pay for each week the employee has worked at least 32 hours, up to a maximum of 40 hours, until such time as, under applicable Board law, it no longer has an obligation to do so.

(b) Make its employees whole for the amounts by which their 1991 and 1992 Christmas bonuses were reduced, in the manner set forth in the remedy section of the judge's decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Newnan, Georgia place of business, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to abide by the terms of the 1990–1993 collective-bargaining agreement with the United Steelworkers of America, AFL–CIO–CLC by failing to pay employees' Christmas bonuses in 1991 and 1992 in accord with our longstanding formula of 1 hour's pay for each week an employee had worked at least 32 hours, up to a maximum of 40 hours.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL abide by the terms of the 1990–1993 collective-bargaining agreement with the Union by restoring the formula for paying employees a Christmas bonus based on 1 hour's pay for each week an employee has worked at least 32 hours, up to a maximum of 40 hours, until such time as, under applicable Board law, we are no longer obligated to do so.

WE WILL make our employees whole for the amounts by which we reduced their 1991 and 1992 Christmas bonus, with interest.

BONNELL/TREDEGAR INDUSTRIES, INC.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Richard P. Prowell, Esq., for the General Counsel.
Lyle J. Guilbeau, Esq., Chief Labor Counsel, of Richmond, Virginia, for the Respondent.
Samuel H. Heldman, Esq. (Cooper, Mitch, Crawford, Kuykendall & Whatley), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on May 13, 1992, by United Steelworkers of America, AFL–CIO–CLC (the Union). Complaint issued on July 17, 1992, and alleges that Bonnell/Tredegar Industries, Inc.[1] (Respondent or the Company),[2] on or about December 13, 1991, changed the method of computation and reduced the amount of the annual Christmas bonus paid to its employees, contrary to past practice and the terms of an existing collective-bargaining agreement. Such actions are alleged to be violative of Section 8(a)(5) and (d) of the National Labor Relations Act.

This case was heard before me in Atlanta, Georgia, on November 6, 1992. Thereafter, the General Counsel, the Respondent, and the Charging Party filed briefs. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Virginia corporation with an office an place of business located at Newnan, Georgia, where it is engaged in manufacturing aluminum extrusions. During the calendar year preceding issuance of the complaint, a representative period, the Respondent sold and shipped goods valued in excess of $50,000 from its Newnan, Georgia facilities directly to customers located outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Factual Summary*

The Union has represented the Respondent's employees in an appropriate unit at its Newnan, Georgia facility pursuant to collective-bargaining agreements for at least 18 years. For the same period of time, the Company has paid its employees a Christmas bonus. The method of calculation of the

[1] The complaint was amended at the hearing to indicate the Respondent's name as set forth above.
[2] Ibid.

bonus was 1 hour's pay for each week in which the employee worked at least 32 hours, up to a total of 40 hours.

The prior collective-bargaining agreement, executed in January 1987, and the current agreement, signed in January 1990, list a ''Christmas Bonus'' as one component of an ''Industrial Relations Plan,'' and the employees were entitled to ''such service credit as accrued under the Company's continuity of service rules.''

The contracts provided that ''[a]ll of these plans shall remain in full force and effect during the term of this Agreement.'' However, the Company could, on notice to the Union, make any changes necessary to assure that company contributions would be considered as tax deductions and not wages.[3]

The method of computing the Christmas bonus is not spelled out in the contract. The parties stipulated that the provisions for a Christmas bonus in prior contracts were not more specific than those in the current agreement.

Both the 1987 and 1990 contracts reflect agreement on a wide range of issues. Both agreements contain, in identical language, sections entitled ''Entire Agreement,'' sometimes referred to as a ''zipper clause'':

> ARTICLE XXIV
>
> ENTIRE AGREEMENT
>
> This Agreement constitutes the sole and entire existing agreement between the parties and supersedes all prior agreements, committments [sic], and practices, whether oral or written, between the COMPANY and the UNION or the COMPANY and any of the covered employees, and expresses all obligations of, and restrictions imposed on, the COMPANY.[4]

Both agreements contain identical sections entitled ''Management of Plant.''[5]

The Union's assistant regional director, Johnny Long, was the union spokesman for the 1987 negotiations. He could not recall any discussion of article XXIV (''Entire Agreement'') or the Christmas bonus during those negotiations. The company spokesman for the 1990 negotiations was B. F. Wilburn, who testified that there was no discussion of the Christmas bonus ''across the table'' during those negotiations. Wilburn stated that he told the union negotiator that he did not like Christmas bonuses because the Company rarely got recognition for giving them, but added that the parties ''did not actually discuss'' the bonus.

The Company issued an employee handbook which became effective in March 1990.[6] The handbook had a section entitled ''Benefit Summary,'' which announced a ''Christmas Bonus'' and spelled out the prior formula for its computation.[7] The bonus for Christmas 1990, which was the first year of the current contract, was calculated according to the prior formula.[8]

Union Assistant Regional Director Long testified that the Union heard a rumor in early 1991 that the Company was planning to reduce the Christmas bonus. He called a company representative, who told him that the Company was considering the matter. There was no offer to negotiate a change, and Long informed the spokesman verbally and by letter that it would be a violation of the contract.[9]

On November 13, 1991, the Company sent a letter to employees announcing that ''the decision has been made to reduce the wage roll Christmas bonus to $100.00 per employee.''[10] The Union filed a grievance, and the Company responded with a denial and a statement that the matter was not subject to arbitration.[11] Thereafter, the Company paid Christmas bonuses in the amount of $100 per employee for Christmas 1991. Union Representative Long testified without contradiction that the average employee had previously received $300 to $400 as a Christmas bonus.

B. *Legal Analysis and Conclusions*

1. Applicable principles

The Board has recently stated applicable law on this matter as follows:

> It is well settled that a bonus paid consistently over a number of years is a component of employee wages and a term and condition of employment, even though not expressly provided for in the bargaining agreement, and that it cannot be unilaterally altered or abolished by the employer without affording the Union notice and an opportunity to bargain. [Citation cited.] Thus, the Respondent's unilateral discontinuation of the bonus program constitutes an unlawful refusal to bargain unless,

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[3] The two agreements list the ''Industrial Relations Plans'' in substantially identical language. The ''plans'' are numbered from 1 to 10. Seven of them have the word ''Plan'' after the description, e.g., ''Group Insurance Plan.'' One of them, ''Continuity of Service,'' has the word ''Rules'' after the description. Two of them ''Christmas Bonus'' (No. 9) and ''Thanksgiving Turkey'' (No. 10) simply describe the ''plan.'' R. Exh. 1, pp. 40–42 (1987 agreement); G.C. Exh. 2, pp. 36–37 (1990 agreement).

[4] R. Exh. 1, p. 51 (1987 agreement); G.C. Exh. 2, p. 46 (1990 agreement).

[5] This section, in the 1987 and 1990 contracts, reads:

> ARTICLE IV
>
> MANAGEMENT OF PLANT
>
> Except as abridged by a specific provision of this Agreement, the management of the plant and the direction of the working force including the right to plan, direct and control plant operations; to contract for work and services; to schedule and assign work to employees; to determine the means, methods, processes, materials, and schedules of production; to determine the products to be manufactured, the location of its plant and the continuance of its departments; to establish production standards and to maintain the efficiency of employees; to establish and require employees to observe COMPANY rules and regulations; to hire, terminate or relieve employees from duties; to maintain order and to suspend, demote, discipline and discharge employees for just cause, are rights solely vested in the COMPANY. The foregoing enumeration of Management's rights shall not be deemed to exclude other rights of Management not specifically set forth; the COMPANY therefore retains all rights not specifically inconsistent with this Agreement. [R. Exh. 1, p. 2 (1987 agreement); G.C. Exh. 2, p. 2 (1990 agreement).]

[6] Testimony of Johnny Long.

[7] G.C. Exh. 3, p. 15.

[8] Statement of company counsel and stipulation of the parties.

[9] G.C. Exh. 5.

[10] G.C. Exh. 4.

[11] G.C. Exh. 6.

> as the Respondent contends, the Union has waived its right to bargain over this matter. [Citation cited.] The right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has been waived the party asserting the waiver must show that the right has been clearly and unmistakably relinquished. Whether such a showing has been made is decided by ''an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective bargaining agreement. *Columbus & Southern Ohio Electric Co*., 270 NLRB 686, 686 (1984), citing *Bancroft-Whitney Co*., 214 NLRB 57 (1974) (other citations omitted). [*TCI of New York*, 301 NLRB 822, 824 (1991).]

Respondent relies principally on the *Columbus & Southern* and *TCI* cases. In the former, the employer had paid a Christmas bonus for approximately 40 years. However, unlike the instant case, there was no reference to it in the collective-bargaining agreements, and it had been discussed only twice. During 1982 negotiations for a new contract, the employer for the first time proposed a zipper clause. It provided that it would ''supersede all prior agreements and understandings,'' and that the collective-bargaining agreement would govern the parties ''entire relationship'' and be ''the sole source of any and all rights or claims which may be asserted in arbitration . . . or otherwise.'' The clause was discussed during contract negotiations, and the union representative agreed that he understood it. The Union asked for a list of agreements that would be terminated, and the employer replied that it did not maintain such a list. By letter the employer notified the Union: ''By specifying 'all' agreements, we feel we have made our notice clear and unambiguous. 'All' means just that—all. What we have done through our 8(d) notice was to wipe the slate clean before the new contract goes into effect.'' The Union filed an 8(a)(5) charge, which was dismissed. The parties thereafter reached agreement on a contract, including the zipper clause. The Christmas bonus was not discussed. The Board concluded that the contract language showed that it was intended to supersede all prior agreements and understandings. Based on this, and the detailed agreements in other provisions of the contract, the Board found that the zipper clause constituted a ''clear and unmistakable waiver.'' *Columbus & Southern Ohio Electric Co*., supra, 270 NLRB at 686, 687.

In *TCI*, the Board states a summary of the facts: ''For about 11 years, the Respondent accorded its unit and nonunit employees a share in a yearly bonus program, and in 1988, this program was discontinued without notice to the Union.'' *TCI*, supra at 824. The Board stated that the bonus for the employees constituted a ''past practice,'' and noted that ''the presence of a zipper clause in successive contracts will not, by itself, necessarily establish a waiver of bargaining rights with regard to existing terms and conditions of employment, especially when it is invoked to justify changes in existing benefits.'' (Citation omitted.) *TCI*, Id.

The Board found nonetheless that the facts in *TCI* warranted a different conclusion:

> This case, however, differs from those in which a party relies on broad contractual language alone to establish that it had the right to act unilaterally with regard to an existing term of employment not covered by contract. Rather . . . during the 1988 negotiations the Respondent proposed a new ''Scope of Bargaining'' provision. The proposed language expressly provided that the agreement's terms would supersede ''all prior agreements, understandings and past practices, oral or written, express or implied between the parties.'' The previous agreement did not contain such a provision. Although the ''Scope of Bargaining'' clause in that contract acknowledged the completeness of the negotiations and contained a waiver of bargaining ''with respect to any subject or matter not specifically referred to or covered in this Agreement including fringe benefits,'' it did not delineate the relationship of the contract itself to past practices or other noncontractual terms and conditions of employment. By contrast, the new language purported . . . . to define its status with respect to ''all prior agreements, understandings and past practices.''
>
> The Union's resistance during bargaining to the new language demonstrates that it also took the proposal seriously and understood that it would have an impact on the final agreement and on the parties' obligations. . . . In short, under the circumstances of this case, the Union, by accepting the strongly worded proposal, knowingly agreed to define the bargaining relationship as the Respondent had proposed. [*TCI*, supra at 824, 825.]

Based on these facts, the comprehensiveness of the bargaining, and the broad nature of the zipper clause, the Board concluded that the parties had ''chosen to place within the contract's four corners all agreements arising out of the negotiations.'' *TCI*, supra. Accordingly, the Board found that the Union had waived its right to bargain over the discontinuation of the bonus plan, and dismissed the complaint.[12]

The Board in *TCI* distinguished a contrary result in another case as follows:

> We find this case distinguishable in this and other respects from *Pepsi Cola Distributing Co*., 241 NLRB 869 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981), in which the Board found, despite the presence of factors relied on here, i.e., the opportunity to negotiate contract terms, the specificity of the language at issue, and the completeness of the parties' agreement, that the union had not waived the right to bargain over the elimination of a bonus. In *Pepsi-Cola*, the Board inferred, in part from the employer's practice of paying the bonus even through the agreement's zipper clause on its face relieved it of the obligation to do so, that the parties intended to continue the bonus plan despite the continued presence in the contract of a zipper clause. In that case, however, unlike here, the respondent made no proposal to change the language of the zipper clause. Therefore, in that case, no event put the union on notice that the employer contemplated a change in the bargaining relationship. Compare also *Aeronca, Inc*., 253 NLRB 261,

[12] Member Cracraft dissented.

> enf. denied 650 F.2d 501 (4th Cir. 1981). [*TCI*, supra at 825 fn. 5.]

And, after noting *Aeronca*, the Board commented on it:

> Compare *Aeronca, Inc*., supra, 253 NLRB at 265 (where no new contractual provisions were proposed or discussed during negotiations that would reasonably alert union to alteration of its rights concerning a bonus, union did not waive right to bargain about Christmas turkeys by agreeing to zipper clause carried over from previous agreements). [*TCI*, supra at 825 fn. 6.]

Finally, the Board in *TCI* explained that its holding was governed by the facts in that case.

> We emphasize that our analysis does not imply that employers may rely on the broad wording of so-called ''zipper clauses'' alone to avoid bargaining over changes in terms and conditions or employment. We adhere to the well-settled view that a waiver of a statutory right must be conscious and informed. [Id. at fn. 7.]

2. Conclusion

The facts in this case clearly place it within the rationale of *Pepsi-Cola* and *Aeronca*, rather than *Columbus & Southern* and *TCI*. A Christmas bonus had been a provision of prior collective-bargaining agreements. The Company had paid the bonus for many years, and had computed its amount according to a formula based on employee attendance. The formula was not stated in the contract. This practice coexisted with the presence of a broad zipper clause, at least back to the prior agreement. There was no bargaining over the clause or the bonus during the preceding negotiations. And, when the parties bargained for the current agreement, there was no discussion at the bargaining table about the bonus. A casual comment by the company spokesman, away from the bargaining table, that he did not like bonuses, did not constitute bargaining. Nor was there, unlike the cases cited by Respondent, any new or altered zipper clause. Nor is there any evidence that the parties agreed that the existing zipper clause would have any effect on the existing method of computing the Christmas bonus. Indeed, there is no evidence that either was discussed during the negotiations leading to the current agreement.

Finally, subsequent to execution of the last agreement in January 1990 including the zipper clause on which Respondent relies, the Company issued an employee handbook in March 1990 restating the old formula for computing the Christmas bonus. And, still later, during the 1990 Christmas, the Company continued to calculate the bonus according to the prior formula. As the Board stated in its discussion of the *Pepsi-Cola* case, the Board

> inferred, in part from the employer's practice of paying the bonus even though the agreement's zipper clause on its face relieved it of the obligation to do so, that the parties intended to continue the bonus plan despite the continued presence in the contract of a zipper clause. [*TCI*, supra at 825 fn 5.]

The Charging Party makes a similar argument—the zipper clause in January 1990 by its terms superseded only ''prior'' practices, whereas the subsequent employee handbook and use of the prior formula in December 1990 created a new practice.[13]

All the Respondent has to rely on in this case, in substance, is the same broad zipper clause which had existed previously. As the Board stated in *TCI*, this is insufficient to establish that it had a right to act unilaterally with regard to an existing term of employment not covered by the contract. The existing method of computing the bonus, as well as the bonus itself, was a term of employment. The zipper clause in the current agreement does not establish that the Union made a conscious and informed decision to waive its right to bargain over the method of computing the bonus.

The management-rights clause does not contain any provision giving the Company the right to change unilaterally its employees' compensation or other benefits.

On the basis of the foregoing findings of fact and the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act representing the appropriate unit of:

> All production and maintenance employees and truck drivers employed by the Respondent at its Newnan, Georgia, plant, but excluding all office clerical employees, technical employees, buyers, salesmen, professional employees, guards, watchmen and supervisors as defined in the Act.

3. The Respondent and the Union have at all material times been parties to a collective-bargaining agreement covering the employees in the above-described unit.

4. By unilaterally discontinuing its established method of computing an employee Christmas bonus, and by establishing a new method of determining the amount of the bonus, which reduced it, on about November 13, 1991, without notification to or consultation with the Union, the Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.[14]

5. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been determined that Respondent has committed certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom.

I shall also recommend that Respondent be required to make whole its employees for the amounts by which their 1991 Christmas bonuses were reduced, if any, by Respondent's use of a new formula for determining the amount of the bonus. Respondent shall also pay its employees interest

[13] C.P. Br. 12.

[14] In light of my conclusion above, I consider it unnecessary to determine whether the prior method of computation was a term of the collective-bargaining agreement.

on the amounts by which the bonus was unlawfully reduced, as set forth in *New Horizons for Retarded*, 283 NLRB 1173 (1987).[15]

In addition, I shall recommend that Respondent, subsequent to 1991, be required to pay Christmas bonuses computed in the same manner, until such time that it is no longer required under applicable Board law to utilize such a computational method.

I shall also recommend the posting of appropriate notices.

[Recommended Order omitted from publication.]

[15] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) is computed as in *Florida Steel Corp*., 281 NLRB 651 (1977).